

AMERICAN ARBITRATION ASSOCIATION

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| In the Matter of the Arbitration | : | |
| | : | AAA Case No. |
| between | : | 14 390 00179 12 |
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| CITY OF PHILADELPHIA, | : | Opinion & Award |
| | : | |
| “City” | : | Re: Suspension of |
| | : | Linda Wagner |
| - and - | : | |
| | : | Hearing: September 10, 2012 |
| F.O.P, LODGE NO. 5, | : | |
| | : | |
| “Union” | : | |
| -----X | : | |

APPEARANCES

For the City

CITY OF PHILADELPHIA LAW DEPARTMENT
Colin Haviland, Esq., Assistant City Solicitor

For the Union

JENNINGS SIGMOND, P.C.
Marc Gelman, Esq., Of Counsel

BEFORE: David J. Reilly, Esq., Arbitrator

BACKGROUND

The Department suspended Police Officer Linda Wagner for five days beginning March 5, 2012. It did so based upon one charge of "Conduct Unbecoming," alleging Wagner violated Section 1-§011-10 of the Department's Disciplinary Code by her actions on January 10, 2011. This included making an inappropriate "Assist Officer" call. (Joint Exhibits 2 & 3.)¹ The Union contends the City lacked just cause to impose this suspension. It asks that the suspension be reversed and Wagner be made whole for all pay and benefits lost as a consequence of it.

The basic facts of this case, including the areas of dispute, may be set forth succinctly.

Wagner has been a member of the Department for over fifteen years. She has no record of prior discipline.

The suspension at issue stems from a January 10, 2011 altercation that took place between Wagner and D [REDACTED] H [REDACTED] following a traffic incident. According to Wagner, H [REDACTED], who was then engaged in a romantic relationship with her ex-husband M [REDACTED] W [REDACTED], "rear-ended" her vehicle that afternoon and became verbally abusive towards her. In response, Wagner initiated an "Assist Officer" call.

Department Directive 6, which governs the use of Police Radio, specifies that an "Assist Officer" call is for use "where a police officer or other person is in danger of death or serious bodily injury or if riotous conditions exists [sic.] which the police can no longer control." (City Exhibit 2.) Sergeant M [REDACTED] C [REDACTED], the street supervisor who

¹ Union counsel represented that the Department unilaterally implemented its current Disciplinary Code, effective May 1, 2010, and as such, it has not been accepted by the Union. (Joint Exhibit 3.)

responded to Wagner's call, expounded that an "Assist Officer" call is appropriate when an officer is in "serious trouble" and in need of backup.

C [REDACTED] and Police Officers G [REDACTED] S [REDACTED] and C [REDACTED] M [REDACTED], the first two officers to arrive at the scene in response to Wagner's call, provided similar accounts of the situation that they encountered. S [REDACTED] recalled that Wagner was standing in the road and H [REDACTED] was inside her vehicle, which was located several yards behind Wagner's car.² He related that as he approached Wagner, she identified herself as a police officer and began shouting that H [REDACTED] should be arrested for hitting her car. He stated that she repeatedly demanded, "I want this bitch locked up."

S [REDACTED] also detailed his inspection of both Wagner's and H [REDACTED]'s vehicles. He stated that he observed no damage to either car. In addition, he noted that the road salt residue on both vehicles appeared undisturbed. In describing the lighting conditions at the time of his inspection, S [REDACTED] said, there was "a pretty good bit of daylight," and indicated he did not need to use his flashlight.³

C [REDACTED] testified that after assessing the situation, she classified it as a disturbance.⁴ Consequently, she released all of the other responding officers from the scene and directed S [REDACTED] and M [REDACTED] to complete the job.⁵

² S [REDACTED] prepared a diagram of the scene, showing the location of both Wagner's and H [REDACTED]'s vehicles. M [REDACTED] and C [REDACTED] each confirmed the accuracy of this diagram, except C [REDACTED] indicated that H [REDACTED]'s vehicle was closer to Wagner's vehicle than S [REDACTED] had indicated. (City Exhibit 3.)

³ S [REDACTED] averred that it was approximately 5 p.m. when he made his visual inspection of the two vehicles. Consequently, the Union has requested that I take arbitral notice of when sunset occurred that day. According to the United States Naval Observatory, Astronomical Applications Department, on January 10, 2011, in Philadelphia Pennsylvania, sunset occurred at 4:54 p.m., and civil twilight ended at 5:24 p.m. http://aa.usno.navy.mil/cgi-bin/aa_pap.pl.

⁴ C [REDACTED] and S [REDACTED] also testified concerning their conversations with H [REDACTED] and two witnesses concerning the events that had transpired prior to their arrival at the scene. As none of these individuals testified at the hearing in this case, C [REDACTED] and S [REDACTED]'s testimony in this respect amounts to hearsay, and

In her testimony, Wagner stated that the January 10, 2011 traffic incident and ensuing altercation was part of a series of escalating hostilities between her and H [REDACTED] which had begun the prior month. She indicated that this had been triggered by certain actions on her part, which included: (1) advising H [REDACTED] of M [REDACTED] W [REDACTED]'s criminal record; and (2) notifying H [REDACTED]'s husband of her relationship with M [REDACTED] W [REDACTED]. She recited that in response: (1) on December 27, 2010, H [REDACTED] called her cell phone several times threatening to file a false report against her with Internal Affairs; and (2) on January 9, 2011, M [REDACTED] W [REDACTED] and H [REDACTED], after passing her vehicle while traveling in the opposite direction, made a sudden U-turn with their car in an unsuccessful attempt to follow her. (Union Exhibits 1 – 5.) Concluding matters were escalating, Wagner recounted that on the morning of January 10, 2011, she attempted to obtain a protection from abuse order (“PFA”) against H [REDACTED], but was advised that she must first send a cease and desist request.

Addressing the traffic incident later that day, Wagner recalled that shortly before 5:00 p.m. while traveling to the gym, she observed H [REDACTED] driving in a vehicle immediately behind her. Believing that H [REDACTED] was following her based upon the prior day’s incident, she responded initially by accelerating her vehicle. However, shortly thereafter, she had to brake abruptly due to traffic. Wagner stated that when she did so, H [REDACTED]'s vehicle “tapped” the rear of her car. She described being shaken by the contact between the two vehicles.

therefore, cannot be accepted for the truth of the matter asserted. Accordingly, for brevity sake, I will not include a summary of this testimony.

⁵ C [REDACTED] testified that a total of at least six officers responded to Wagner’s “Assist Officer” call

Wagner related that at this point, H [REDACTED] exited her vehicle and came to the driver's side door of her car and said, "I told you to stay away from my husband, I'm going to give you one more chance."⁶ H [REDACTED] then returned to her vehicle and began blowing the horn and shouting, "she's beating me."

Wagner stated that in response, she got out of her car and approached H [REDACTED]'s vehicle. When she started to back up her car, Wagner attempted to block her from doing so. Believing that H [REDACTED] should be arrested for recklessly chasing and colliding with her car, Wagner then placed a "911 call" from her cell phone stating, "I'm an off-duty officer, I need police assistance."

The events of this January 10, 2011 traffic incident and "Assist Officer" call came to the attention of the Department's Internal Affairs Division the following day when H [REDACTED] filed a "complaint against police," alleging that Wagner had verbally abused and harassed her. Lieutenant Danielle Vales, who investigated the complaint, concluded that Wagner's actions in connection with this altercation constituted conduct unbecoming an officer. She testified that her determination rested on the following: (1) Wagner had wrongfully made an "Assist Officer" call based upon a traffic accident that had not occurred; and (2) Wagner had behaved inappropriately by shouting and demanding that the responding officers arrest H [REDACTED]. (City Exhibit 1.)

On that basis, the Department charged Wagner with violating Disciplinary Code Section 1-§011-10, Conduct Unbecoming – Abuse of Authority. (Joint Exhibit 2.)

Following a hearing on January 5, 2012, a Police Board of Inquiry ("PBI") found Wagner guilty of the charged offense. Consistent with the PBI's recommended penalty,

⁶ This statement apparently related to the fact that Wagner had recently informed H [REDACTED]'s husband of her relationship with M [REDACTED] W [REDACTED].

the Department suspended Wagner for five days beginning March 5, 2012. (Joint Exhibit 2.)

This action prompted the instant grievance. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. Pursuant to their contractual procedures, the parties selected me to hear and decide the case.

I held a hearing on September 10, 2012, at the offices of American Arbitration Association in Philadelphia. At the hearing, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I declared the hearing record closed as of that date.

DISCUSSION AND FINDINGS

The Issue:

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to suspend the grievant, Police Officer Linda Wagner for five days, effective March 5, 2012?
2. If not, what shall be the remedy?

Positions of the Parties

The City contends that its suspension of Wagner was for just cause. It maintains that the evidence conclusively demonstrates her guilt on the Section 1-§011-10 charge of Conduct Unbecoming – Abuse of Authority.

The City argues that on the established record there can be no question that Wagner abused her authority by both initiating the “Assist Officer” call and demanding that the responding officers arrest H [REDACTED]. It maintains that on the evidence

presented, including Wagner's own testimony, she had no valid basis to make an "Assist Officer" call. At no time was she ever in any danger.

It stresses that S█████'s testimony refutes her claim that H█████ "rear-ended" her vehicle. Further, it asserts that even if contact did occur between the two vehicles, it constituted, at most, a minor "fender bender," which in no way warranted an "Assist Officer" call. It notes that the only risk of danger that Wagner faced during the entire incident came not from H█████, but rather her own actions in attempting to block H█████'s vehicle.

For these same reasons, the City submits, Wagner had no reasonable basis to conclude that H█████ had committed any criminal act. As such, she plainly abused her authority in demanding H█████'s arrest.

In sum, the City, while acknowledging the unfortunate domestic situation at the root of this matter, asserts it cannot excuse Wagner's behavior. Indeed, it stresses that doing so would contravene its responsibility to enforce appropriate standards of conduct for its officers. Simply put, Wagner's actions on January 10, 2011 were well outside the bounds of acceptable behavior, and plainly constituted just cause for the suspension imposed.

Accordingly, for all these reasons, it asks that the suspension be sustained and the grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to suspend Wagner for a violation of Department Disciplinary Code Section 1-§011-10 (i.e., Conduct Unbecoming – Abuse of Authority) based on the events of January 10, 2011. The Union submits that the City has failed to meet its burden of proof in this regard.

It begins by pointing out that the Department's notice of discipline is a hodgepodge of evidence, theories and argument, which leaves uncertain the actual reasons for Wagner's suspension. It submits further that on the evidence presented, the Department has failed to establish a proper foundation for disciplining Wagner for the charged offense.

It reasons that the City has no basis to claim that Wagner abused her authority in making the "Assist Officer" call. It asserts that as a foundational matter, the City failed to establish with sufficient specificity the permissible use of an "Assist Officer" call under Directive 6. Further, it highlights that the testimony of the City's own witnesses reflects that, in practice, officers use the "Assist Officer" call in situations beyond the two expressly referenced in Directive 6. Specifically, the City's witnesses acknowledged that officers frequently use it when apprehending suspects. As such, it submits that the Department actually affords officers considerable discretion in determining when an "Assist Officer" call is warranted.

The Union concludes that Wagner's "Assist Officer" call on January 10, 2011 constituted a proper exercise of that discretion in view of the surrounding circumstances. It argues Wagner had a reasonable basis to fear H [REDACTED]. In support, it cites both the escalating hostilities and H [REDACTED]'s immediate conduct in pursuing and colliding with Wagner's vehicle.

It contends that in reaching the opposite conclusion, the Department erroneously evaluated Wagner's conduct based on the conditions found after the fact by the responding officers and Internal Affairs. Instead, it should have assessed whether the circumstances known to Wagner at the time of the altercation provided her with a

reasonable basis to conclude that her safety was in jeopardy, and therefore, an “Assist Officer” call was justified. Evaluated by this standard, the Union avers, there can be no doubt as to appropriateness of her decision.

Finally, the Union contends that Wagner’s conduct on the scene after the arrival of the responding officers cannot serve to establish the charge that she abused her authority. It notes that in demanding H [REDACTED]’s arrest, Wagner did not take any “official” action. Instead, she functioned strictly in her off-duty capacity. Therefore, by definition, her conduct cannot be deemed to be an abuse of her authority.

Accordingly, for these reasons, the Union asserts that its grievance should be granted.

Opinion

The Department, no doubt, has a right and an obligation to set and enforce standards for the proper use of the “Assist Officer” call. It is a priority call. All officers receiving it must respond immediately by proceeding to the requesting officer’s location with all deliberate speed. Doing so necessarily poses a risk to their safety and that of the public. Therefore, officers who abuse their authority by making an “Assist Officer” call without proper basis, can and should expect to receive discipline.

I am satisfied from the text of Directive 6 and the testimony of the City’s witnesses that an “Assist Officer” call is for use when an officer is in danger of death or serious bodily injury or faces riotous conditions beyond his/her control. I note that the Department does afford its officers some discretion in determining whether those conditions exist, such as with the apprehension of a suspect. However, that discretion is not limitless. I conclude that the governing standard is whether the officer, under the

circumstances confronted. had a reasonable basis to conclude that his/her physical safety was in serious jeopardy.

Judged on this basis, I am persuaded that Wagner abused her authority in making an "Assist Officer" call in connection with her January 10, 2011 altercation with H[REDACTED]. My reasons for this conclusion follow.

It is true that Wagner was the only witness to testify who had first-hand knowledge of the actual circumstances with which she was confronted when she made the "Assist Officer" call. However, the absence of testimony from H[REDACTED] and the two witnesses to the incident does not compel me to accept at face value Wagner's assertion that she feared for her safety. Instead, I must assess the reasonableness of her purported state of mind in light of all of the evidence presented. In doing so, I find that Wagner lacked a reasonable basis to conclude that H[REDACTED] posed a physical threat.

In reaching this conclusion, I am heavily influenced by Wagner's own account of the incident. Nothing she described evidenced any reason to conclude that H[REDACTED] threatened her safety.

The contact that allegedly occurred between their vehicles was extremely minor without any resulting damage.⁷ Indeed, Wagner described it as a "tap." Moreover, at no time thereafter did H[REDACTED] say or do anything to suggest that the collision was intentional or that she intended to cause Wagner any harm. Instead, after initially approaching and warning Wagner to stay away from her husband, H[REDACTED] retreated to her vehicle where she remained when Wagner placed the "Assist Officer" call.

⁷ Relying on S[REDACTED]'s inspection of the two vehicles, the City disputes that there was such a collision. However, for the reasons stated above, it is unnecessary for me to resolve that issue.

Wagner's own actions belie her claim that she feared for her safety. She took no measures to protect herself from H [REDACTED] during this altercation. To the contrary, she exited her vehicle and attempted to block H [REDACTED]'s departure so she would be forced to remain at the scene until the responding officers arrived. These circumstances reflect that she made the "Assist Officer" call not out of concern for her physical safety, but to expedite the response time of her fellow officers.

The events that preceded this incident do not cause me to reach a different conclusion. The escalating hostilities that Wagner recounted (i.e., harassing telephone calls; attempt to follow her) were obviously annoying and certainly disconcerting. However, upon examination, I do not find that they offer any basis to conclude that H [REDACTED] was becoming a physical threat. This remains true even when evaluated in light of the events of January 10, 2011.

In sum, I am persuaded that Wagner abused her authority in making the "Assist Officer" call on January 10, 2011. In view of the risks inherent in such a call, as described above, this offense standing alone justified the five-day suspension imposed.

Accordingly, the Union's grievance is denied.

AWARD

1. The City had just cause to suspend Police Officer Linda Wagner for five days effective March 5, 2012.
2. The grievance is denied.

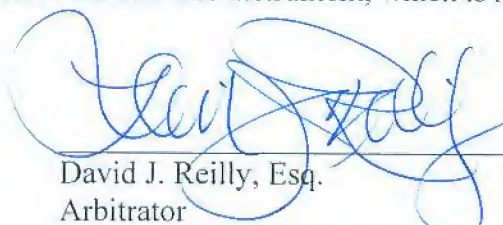
October 9, 2012


David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) ss.:

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

October 9, 2012


David J. Reilly, Esq.
Arbitrator